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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 391

STATE FARM FIRE AND CASUALTY COMPANY and GREYHOUND LINES, INC.,
Petitioners,

v.

KATHERINE TASHIRE, EVA SMITH, HARRY SMITH, LILLIAN G. FISHER, BARBARA McGALLIAND, DORIS ROGERS, GAIL R. GREGG, RICHARD L. WALTON, heir of SUE WALTON, and DONALD WOOD,
Respondents.

RESPONDENTS' BRIEF

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RESPONDENTS' BRIEF

INTRODUCTION

Respondents do not take exception to Petitioners' references to OPINION BELOW and JURISDICTION. Respondents contend that Rule 22 is not involved in this cause.

QUESTIONS PRESENTED

Respondents contend that the question presented for determination by this Court should more properly be expressed as follows:

Whether the District Court has jurisdiction under 28 USC §§ 1335, 1397 and 2361 (The Federal Interpleader Act) over a casualty insurer's action to determine its insured's liability for unliquidated tort claims involving a multiple-claim catastrophe causing injuries to citizens of different states and a foreign country when the insured was one of two or more joint tort feasors.

RESPONDENTS' STATEMENT OF CASE

1. The Nature of the Action

Respondents accept this portion of petitioners' statement with the following additions:

The defendant injured passengers on the Greyhound bus filed action against State Farm's insured and Greyhound and its driver (R. 4, 104), claiming they were joint tort feasors. The policy limits of $20,000 relate only to bodily injury (R. 8), and the interpleader action does not involve claims for property damage.

2. The Interpleader Allegations of the Complaint

In addition to those matters set forth on page 4 of petitioners' brief, the complaint contained the following allegations:

(a) Those injured and those making claims were citizens of several states and two of the provinces of Canada (R. 2).

(b) State Farm denied any duty to defend the defendant Clark, its assured.

3. Proceedings in District Court

In addition to the matters referred to in petitioners' brief (pp. 5, 6), on May 14, 1965, petitioner Greyhound filed an answer to State Farm's complaint and cross-claims for declaratory relief (R. 101, et seq). Thereafter, the Court entered an order modifying the restraining order to permit defendants to file actions against various defendants, but at the same time continued the injunction preventing the defendants from prosecuting such actions against State Farm's assured; Greyhound Lines or its driver (R. 170).

4. Proceedings in the Court of Appeals

Petitioners indicate that the only subject of appeal was the question of personal jurisdiction. These respondents presented the question to the Ninth Circuit Court as follows:

> "The question is not whether the delivery of the complaint and restraining order by registered mail to the Canadian residents is sufficient service of process. It is appellants' position that the United States District Court does not have jurisdictional power, regardless of the method of service, to render an effective restraining order as against residents of Canada. It is appellants' position that the Canadian residents are necessary parties, and the inability to bring them before the Court renders the entire proceeding invalid."

SUMMARY OF ARGUMENT

1. The questions before the Court are not only those raised by petitioner but also include the questions presented to the Circuit Court of Appeals for the Ninth Circuit; in a proceeding brought under 28 U.S.C. 1335 does service under § 2361 control or may Rule 4(i)D of the Federal Rules of Civil Procedure be invoked.

An additional problem, not apparent from petitioner's brief, but nevertheless present, is that the petitioners are the insurance carrier for only one of two or more tort feasor. Respondents raise these matters in support of the decree of the Court below, even though not presented as issues in the petition for writ of certiorari, as they may do under the authority of the decision of this Court in *Langness* v. *Green*, 282 U.S. 531.

A. Rule 22 of the Federal Rules of Civil Procedure is not applicable to this case, although considered by the Court below along with the statutory interpleader under 28 U.S.C. 1335. Rule 22 applies only when all claimants can be served within the District where suit is brought. The rule was applicable in *Underwriters at Lloyds* v. *Nichols*, 363 F.2d 364, where all claimants resided in Arkansas. However, respondents agree that case precedence under Rule 22 and under 1335 should be construed together because of the similarity of construction of the rule and the statute.

B. Respondents are not claimants under 28 U.S.C. 1335 since the Oregon and California law does not permit a direct action against the insurer in a case arising out of a motor vehicle accident before judgment. The contrary is true. Such action is forbidden until 30 days after judgment providing the judgment is unsatisfied.

While the Eighth Circuit was of the opinion that the use of interpleader should not depend upon the existence of a direct action statute, the Ninth Circuit felt that the existence of such a statute as in Louisiana underscored the conclusions and its opinion.

2. Where there is a direct conflict between the two statutes pertaining to the same subject matter, one general in nature and one specific, the specific statute prevails. If a general statute is amended, but there appears no intent to amend the specific statute, the specific statute controls.

A. Service here was attempted under Rule 4(i)D of the Federal Rules of Civil Procedure upon alleged claimants who were citizens of Canada and resided therein. Rule 4(i)D provides for service by registered mail. 28 U.S.C. 2361 provides that in actions brought under 28 U.S.C. 1335, service is to be made by the U. S. Marshal for the District in which the claimants may be found. Section 2361 is a specific statute concerning the method of service in a § 1335 proceeding and controls. Therefore, the Canadian residents were never personally served and the Court acquired no

in personum jurisdiction over them. They are indispensible parties to the proceedings and without them, no final disposition of the matter can be made and therefore no jurisdiction of this bill in the nature of interpleader was acquired.

3. Petitioners plead that uniformity among the states should be the controlling principle in determining jurisdiction. This is misleading, even in removal matters, it has been held that if the state lacks jurisdiction the federal court has none, and under Rule 4(e) of the Federal Rules of Civil Procedure, the jurisdiction of the Federal Court would depend upon the laws of the various states.

4. If interpleader is granted, the restraining order should be limited so as to prevent execution on the insurance policy until all claimants able to do so have reduced their claims to judgment. Interpleader is equitable in nature and the Court is required to balance the equities between the various parties. A limited restraining order would be a more effective tool to accomplish this, and the claimants would have the right to a jury trial and selection of form preserved.

A. A distinction should be made between true interpleader and cases involving liability insurance carriers. In true interpleader the stake holder with a life insurance company or financial institution, etc., has only the obligation to deliver a fund to the proper claimant. In liability insurance claims, the "stake holder" must pay the claim to the extent of coverage and also must contest and defend the liability claim.

B. Where two or more tort feasors are involved, all proceedings against all tort feasors are restrained and the injured parties are prevented from proceeding against the assets of the assured. If the Court relieves the insurance carriers of their duty to defend after depositing the amount of their policies with the Court, but holds that the injured parties could present their claims in that Court only against the assets of the tort feasors, the insurance carriers are thereby protected from having to defend against the claims but this does not avoid multiplicity of actions and deprives the assureds of their contractural right to have their insurance carrier defend the actions, and also reduces the assets available to the claimants upon which to execute.

C. Petitioners contradict themselves when on the one hand they state that multiple litigation must at all costs be avoided and on the other represent that a jury trial would be saved to the alleged claimants. If the latter are entitled to individual jury trials, no great savings results. If one mass jury trial is allowed regarding liability and damages, claimants would be effectually denied their right to trial by jury.

D. The solution arrived at in *Travelers Indemnity Co.* v. *Greyhound*, 260 F. Supp. 530, Adv. Sh. (1966), if interpleader is appropriate, would thus protect and preserve the rights of the various parties hereto.

ARGUMENT

I

Introduction

The action originally brought by State Farm primarily sought determination of its duties and obligations under its liability policy. State Farm stated that it had no authority to admit liability on behalf of its assured and contended there was no coverage under the policy. It also stated that if coverage be found, it relinquished all claim to the sum deposited with the Clerk of the Court and asked that it be relieved of its obligation to defend lawsuits pending or later filed against its insured.

Respondents take the position that this proceeding cannot be maintained under Rule 22, but, if at all, only under the Federal Interpleader Act (28 U.S.C., §§ 1335, 1397, and 2361).

Respondents maintain that these matters raised by them before the Ninth Circuit Court are fairly comprised within the question presented to this Court by the petition for a writ of certiorari (Rule 40, 1(d)(1); Rule 23, 1. (c)). Respondents also contend that they may include these matters in support of the decision of the Ninth Circuit Court.[1]

The Circuit Court of Appeals for the Ninth Circuit in rendering its decision did not pass upon the questions raised by these respondents, petitioners

[1] *Langness* v. *Green*, 282 U.S. 531, 536, 538.

therein, pertaining to the effectiveness of service under Rule 4(i), paragraph D, upon citizens of Canada by registered mail, and whether such service was sufficient to give the United States District Court for the District of Oregon in personum jurisdiction over said Canadian citizens. In order to decide that question, it is necessary to determine whether the Amendments to Rule 4 of the Federal Rules of Civil Procedure, effective July 1, 1963, and particularly, 4(i), a general service provision, are applicable to causes under the interpleader statute when 28 U.S.C. 2361 specifically provides for method of service in statutory interpleader or bills in the nature of interpleader. Implicit in these questions is the further issue as to whether this action in the nature of a bill of interpleader is a proceeding in rem or in personum.

Respondents agree with Petitioners that the questions raised before this Court are of substantial importance to all concerned. The problems presented by this cause are not only those of preserving respondents' right to choose a forum in which to bring damage actions with jury trial but that of balancing these interests against the interests of the insurance carrier when claims exceed the dollar limitation of the insurance policy.

Petitioners fail to point up by their brief the further problem involved here, the fact that the petitioning insurance carrier represents only one of the two or more joint tort feasors.

Professor Chafee, in his articles on interpleader,

refers to that part of the proceeding where we now find ourselves as the "first stage" (49 Yale Law Journal, 414). Included within the problems presented at this stage is the form of the restraining order, if any, which the Court should issue if jurisdiction is found. The Court must of necessity consider duties and responsibilities of the insurance carrier besides the obligation of paying damage settlements or judgments up to the amount of the policy limits. Here, the duties to investigate and defend can be of primary importance to the insured.

Petitioners, in their brief, include substantial material regarding the history of interpleader and the opinions of various courts regarding its interpretation. Might we refer to these articles written by Professor Chafee, the citations of which are included in footnote 2.[2]

II

Rule 22, FRCP, is Not Applicable

State Farm's complaint alleged jurisdiction under Title 28, § 1335, U.S.C. (R. 1). It would appear from the opinion of the Ninth Circuit Court that it considered its jurisdiction under both the Federal Interpleader Act and Rule 22(1) of the Federal Rules of Civil Procedure (R. 171, 172). The petition for cer-

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[2] Chafee: *Modernizing Interpleader* (1921) 30 Yale L. J. 814; *Interstate Interpleader* (1924) 33 Yale L. J. 685; *Interpleader in the United States Courts* (1932) 41 Yale L. J. 1134, 42 *id* 41; The Federal Interpleader Act of 1936 (1936) 45 Yale L. J. 963, 1161; Federal Interpleader Since the Act of 1936 (1940) 49 Yale L. J. 377.

tiorari, at page 2, and in petitioner's brief, at page 2, present the question as to whether Rule 22(1), F.R. C.P., grants jurisdiction.

Rule 22 is not applicable in this cause inasmuch as "the claimants must all be personally served within the District" (quoting from Federal Interpleader, 56 Harvard Law Review, 933).[3]

Certiorari was granted in this cause because the opinion in this case by the Ninth Circuit seemingly conflicts with the decision of the Fifth Circuit in *Underwriters at Lloyds* v. *Nichols*, (1966, CA 8th) 363 F.2d 357. In the *Nichols* case, all claimant-defendants were residents of the State of Arkansas and the cause arose only under Rule 22 (363 F.2d Adv. Sh. 361). Petitioners concede that it would be erroneous for either party to contend that Rule 22 or the Federal Interpleader Act require substantially different interpretations. Respondents cannot but agree with the following language appearing in the *Nichols* case at page 361.

> "* * * Herein all actual and potential claimants are from Arkansas, defeating jurisdiction of the instant controversy under the 1948 Act. However, Rule 22 raises no jurisdictional problems in this regard. Since the interpleader acts and Rule 22 are so similar in construction, case precedents arising under the various acts are certainly relevant to the instant dispute and will be discussed herein."

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[3] See also *Cordner* v. *Metropolitan Life Ins. Co. et al*, 234 F. Supp. 765, at 767, citing 3 Moore's Federal Practice (2d Ed. 1964) Sec. 22.04(2) pp. 3009-10.

III

Respondents are not "Claimants" within the Meaning of 28 U.S.C. § 1335

We do not here feel that we can improve upon the logic and reasoning contained in the decision of the Court of Appeals for the Ninth Circuit in this cause. It is difficult for those familiar with the trial of automobile cases in Oregon to consider clients as "claimants" as against the liability insurance carriers—a concept completely foreign to Oregon statutes and case decisions. Not only is Oregon Revised Statutes 23.230 related to this problem, but ORS 736.320 prohibits the bringing of an action on a judgment until after the judgment has been unsatisfied for a period of 30 days, and also the mention of insurance, even inadvertently, results in a mistrial in a proceeding against an insured.[4]

The Court, in the *Nichols* case, supra, 363 F.2d at page 364, indicated that the use of interpleader should not depend upon the existence or absence of a direct action statute. The Ninth Circuit Court in the instant case felt that the exisence of a direct action statute in Louisiana underscored the correctness of its decision (R. 171).[5]

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[4] *Leishman* v. *Taylor*, 199 Or. 546, 263 P.2d 605.

[5] See Comments 42 *Notre Dame Lawyer* 433 (Pub. date Feb. 1967).

IV

The Court must have jurisdiction of all possible claimants and 28 U.S.C. 2361 provides the only available means of obtaining such jurisdiction.

Interpleader requires that all possible adverse claimants must be brought within the jurisdiction of the Court. In order to effect such jurisdiction, all such claimants must be personally served, since the Court is without jurisdiction as to those not served and cannot render any judgment with respect to any funds deposited with the Court which would be binding on those not properly served. Interpleader and an action in the nature of interpleader seeks to bring about a final and conclusive adjudication of personal rights and therefore requires that all possible claimants to the alleged fund be brought before the Court in order for a judgment to be binding upon them. Therefore, each and every claimant is an indispensable party.[6] In the instant case the action in the nature of interpleader seeks to determine what may be termed as the intangible rights of the defendants. They must first establish their right to any portion of the alleged fund by proving that petitioner's assured was negligent and such negligence was the proximate cause of the injuries and damages to said defendants. They must also prove that the insurance policy of

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[6] *New York Life Insurance Co.* v. *Dunlevy*, 241 U.S. 518, 521, 36 S.C. 613, 60 L. Ed. 1140; *Clement and Martin* v. *Dick Corp.*, 97 F. Supp. 961; *Republic of China* v. *American Express*, 108 F. Supp. 169, 170; *Metropolitan Life Insurance Co.* v. *Dumson*, 194 F. Supp. 9.

petitioner's provided coverage to the assured in this accident and only then can the defendants establish any right to the proceeds of petitioner's insurance policy. In *Estin* v. *Estin*, 334 U.S. 541, 548, this Court held that a judgment for support created a property interest which was an intangible. Jurisdiction of this property right could only arise from jurisdiction over the persons whose relationships were the source of the judgment.

In the instant case respondents have only a cause of action and nothing more. Can any right be more intangible? And it is the exercise of this right which petitioner seeks to restrain. It is submitted that this is an action in personum and the personal rights of the defendants cannot be determined unless they have been properly served. id. *New York Life Insurance Co.* v. *Dunlevy*, supra.

None of the Canadian defendants had any contacts with the state of Oregon in any transaction involving this proceeding. None of them committed any act, tort or transaction within the state of Oregon. The accident occurred in the state of California. It is therefore apparent that no statute of the state of Oregon could be looked to in order to provide a means of service upon the nationals of a foreign country in that country. The method of service then must be controlled by federal statute or rule alone. Petitioners in the Court below contended that 4 (i), Federal Rules of Civil Procedure, and Section 1655 of those rules, control. It was and is respondents' contention that 28 U.S.C. 2361 controls in a proceeding under 28 U.S.C. 1335.

The latter statute is a specific statute pertaining to service of process in statutory interpleader or in bills in the nature of interpleader and contains words of limitation restricting service by "the U. S. Marshals for the respective Districts where the claimants reside or may be found".

Section 1655 of the Federal Rules of Civil Procedure pertains to liens, encumbrances and clouds upon real or personal property and appears to apply to in rem proceedings only, and is therefore not controlling. Secondly, by its terms, it is a statute general in nature and, as between the two, the specific statute, Section 2361 would control.

This Court has ruled that the specific provisions of a statute control exclusively over broader and more general provisions of another statute which may relate to the same subject matter in the absence of a clear manifestation to the contrary by the legislature.[7] Rule 4 of the Federal Rules of Civil Procedure is a general statute pertaining to service of process. 4(i) is one of the amendments to that rule, effective July 1, 1963. Nowhere in the rule, as amended, does there appear any intent to amend or revise Section 2361.

Congress is presumed to know the contents of its statutes, and if it intends the general statute to overrule the specific statute, it would so state.[8]

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[7] *Bulova Watch Co.* v. *United States*, 365 U.S. 753, *Fourco Glass Company* v. *Transmirra Products Corp.*, 353 U.S. 222, *McEvoy* v. *United States*, 322 U.S. 102, *D. Ginsberg & Sons, Inc.* v. *Popkin*, 285 U.S. 204.

[8] *Anderson* v. *Gladdon*, 188 F. Supp. 666, 293 F.2d 463, cert. denied.

It will not be inferred that Congress, in revising the laws, intended to change their effect unless such intention is clearly expressed.*

Petitioners, in the Court below, indicated that service in a foreign country, pursuant to Rule 4(i) has been challenged and upheld. State Farm relied upon *Hoffman Motors Corp.* v. *Alfa Romeo*, 244 F. Supp. 70, (1965), and *Securities & Exchange Commission* v. *Briggs*, 234 F. Supp. 618, (1964).

In the *Hoffman Motors* case, at page 77, at the beginning of headnotes 9 and 10, it is stated:

> "(9, 10) The Automobile Dealers Act (15 U.S.C. Sections 1221-1225) contains no special provision for service of process."

Accordingly, the Court permitted service upon an Italian corporation pursuant to the New York statute providing for service upon a "non-domiciliary" who "transacts any business within the state." The other act involved was the Robinson Patman Act, which contained a special provision concerning service of process (15 U.S.C. Section 22), providing that process may be served "in the District of which (defendant corporation) is an inhabitant, or *wherever it may be found*" (emphasis added).

In the first situation, Rule 4(i) was brought into play because the statute was silent as to service. In the second situation, the statute provided for the method of service and was followed.

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* *Fourco Glass Co.* v. *Transmirra Products Corp.*, supra.

In *Securities & Exchange Commission* v. *Briggs*, supra, service was made upon an American citizen in Canada, the question being whether the Court had power to take in personum jurisdiction over one of its citizens, not physically present within the United States when served with process. The acts complained of were committed in New York and the defendant was physically present at the time of the commission of the act. The service was made under 15 U.S.C. Section 77, v. (a), which states in part:

> "* * * Process in such cases may be served in any other District of which the defendant is an inhabitant *or wherever the defendant may be found.*" (77 v (a)) (emphasis added).

Subsection (e) of Rule 4, F.R.C.P., states as follows:

> "Whenever a statute of the United States or an order of Court thereunder provides for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of, or found within the state in which the District Court is held, service may be made under the circumstances and in the manner prescribed by the statute or court, or if there is no provision therein prescribing the manner of service, in the manner stated in this rule, * * *."

In the notes of the Advisory Committee on Rules, page 72, 1966 Cumulative Pocket Parts, 28 U.S.C.A., Rules 1-11, it is stated concerning Rule 4(e):

> "The amendment of the first sentence inserting the word 'thereunder' supports the original intention that the 'order of court' must be au-

thorized by a specific United States statute. Sec. 1 Barron & Holtzoff, supra, at 731. The clause added at the end of the first sentence expressly adopts the view taken by commentators that, if no manner of service is prescribed in the statute or order, the service may be made in a manner stated in Rule 4. See 2 Moore, supra, ¶ 4.32, at 1004; Smit, International Aspects of Federal Civil Procedure, 61 Colum. L. Rev. 1031, 1036-39 (1961). But see Commentary, 5 Fed. Rules Serv. 791 (1942).

Examples of the statutes to which the first sentence relates are 28 U.S.C. § 2361 (Interpleader; process and procedure); 28 U.S.C. § 1655 (Lien enforcement; absent defendants)."

28 U.S.C. 2361 provides for a method of service, as set forth in Rule 4(e), and is therefore controlling.

Based upon the foregoing it is submitted that the District Court of Oregon never obtained jurisdiction of the Canadian citizens alleged to be claimants to the fund. Not being properly before the Court, there was a failure to bring in indispensable parties and therefore the Court has no jurisdiction of this action in the nature of interpleader. The Decree of the Ninth Circuit Court of Appeals dismissing these proceedings should be affirmed.

V

The decision of the Court below should be affirmed despite state-by-state variations of the grant of federal jurisdiction in interpleader proceedings.

The petitioners plead uniformity among the states as a controlling principle in determining the jurisdiction of the Court. This plea for uniformity as expressed by petitioners is somewhat misleading. Moore's Federal Practice 1A, page 77, § 0.157, refers to the strict construction of the removal statute. Reference is made to *Lambert Run Coal Co.* v. *Baltimore & Ohio R.R. Co.*, 258 U.S. 277, wherein it is indicated that if the state court lacks jurisdiction of the subject matter or of the parties, the federal court acquires none. It would then appear that even in removal matters, which petitioners claim demand uniformity, the jurisdiction of the federal court is based upon state law. For example, a state having a "long-arm statute" or a "nonresident motorist statute" would obtain jurisdiction of parties not amenable to process in states lacking such statutes. The argument for uniformity to establish uniformity must fall.

As a further example of variations of federal court jurisdiction, see Rule 4 (e), Federal Rules of Civil Procedure as amended effective July 1, 1963. The Advisory Committee on the Rules indicates that the amendment was made to allow parties to resort to procedures provided by state law for effecting service on non-resident parties in original federal court actions. Again, the jurisdiction of the federal court

would depend upon the existence or nonexistence of various state laws and would vary from state to state.

VI

If interpleader is granted, the restraining order should be limited so as to prevent execution on the insurance policy.

INTRODUCTION

The problems facing all parties in catastrophies resulting in innumerable injuries or deaths are not new.[10]

This Court is faced with the problem of whether interpleader should be granted. Professor Chafee refers to this as "the first stage." An integral part of this stage of the proceeding is the form of the restraining order granted by the Court. The granting of interpleader without including any restrictions upon defendants would be a useless act. As a practical matter, the primary effect upon the injured grows out of the form of the restraining order, not the allowance of interpleader. There can be no argument but that the interpleader proceeding, both historically and by present-day application, is equitable in nature. This would not only authorize, but would require, the Court to balance the equities between the various interests represented. Petitioners, by their brief, would have the Court balance the benefits and detriments to the respective parties at the time the Court decides whether or not to grant interpleader.

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[10] See *Procedural Devices for Simplifying Litigation Stemming from a Mass Tort*, 63 Yale L. J. 493.

It is submitted that a limited restraining order after the granting of interpleader would give to the Court a more effective tool with which to balance these equities.

Of primary concern to the injured is the right to a jury trial and to make their own selection as to whether actions might be filed in state or federal court and to make their own determination of venue.

Rule 22, F.R.C.P., provides for the granting of interpleader when the plaintiff "is or may be exposed to double or multiple liability"; 28 U.S.C. § 1335, provides for interpleader when two or more people are claiming the same money or property or the same benefits under an insurance policy. Through the years the courts and authors have, by interpretation, talked about "double or multiple vexation," "undue harrassment," and "danger of multiplicity of suits."[11] Petitioners, in their brief, at page 27, make the following statement:

> "It is the primary purpose of interpleader to protect the stakeholder from multiple litigation as well as from multiple liability."

In analyzing the purpose and application of interpleader arising out of multiple claims from a single tort, certain matters must be considered:

1. The majority of the decisions relate to claims made against life insurance companies or bonding

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[11] *Nichols*, 363 F.2d at 364, quoting *Pan American Fire & Casualty Co.* v. *Revere*, (E.D. La., 1960) 188 F. Supp. 474; Prof. Chafee, *The Federal Interpleader Act of* 1936: *II*, 45 Yale L. J. 1166.

companies or financial institutions, each of which has the common denominator of holding a single fund or property and having only the obligation of handing it to the rightful owner.[12]

2. In cases involving liability insurance carriers, the "stakeholder" has two obligations:

(a) Payment of damage claims to the extent of the policy limits;

(b) The duty to defend liability claims.[13]

3. In cases involving two or more joint tort feasors, a restraining order such as entered in this cause (R. 112) effectively prevents the injured parties from proceeding against the joint tort feasors. This would be true even if the Court had not aided the defendants in a subsequent restraining order (R. 170).

4. A restraining order in this form prevents the injured parties from proceeding against the assets of the insured.

Only three cases involving interpleader and joint tort feasors have come to our attention. These are:

(1) Pan American Fire & Casualty Co. v. Revere (D.C. E.D. La., 1960) 188 F. Supp. 474;

(2) Commercial Union Ins. Co. of New York v. Adams (D.C. S.D. Ind. 1964) 231 F. Supp. 860;

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[12] As examples, see: *Standard Surety & Casualty Co.* v. *Baker* (C.A. 8, 1939) 105 F.2d 578; *Treinies* v. *Sunshine Milling Co., Mining*, 308 U.S. 66 (U.S. 1939) and numerous cases cited; Chaffee, 45 Yale L.J. 963, footnote 7 at 965.

[13] As examples, see: *American Casualty Co. of Reading, Pa.*, v. *Howard*, 187 F.2d 322 at 326 and see R. 8, ¶ 1.

(3) Travelers Indemnity Co. v. Greyhound Lines, Inc., et al, (D.C. W.D. La., Lake Charles Div. 1966) 260 F. Supp. 530 (Adv. Sh.).

The *Revere* case, commencing at page 483, discusses the entry of the restraining order; also, at page 486, expresses the order in the following language:

> "Injunctions will issue, restraining all parties from further prosecuting any pending suits against plaintiff or its assured on account of the accident described, or from instituting like proceedings before this or any other Court."

In this case, a school bus and a large tractor-trailer collided head-on resulting in the death of three children and injuries to 23 others. Two automobiles following the bus became involved in the accident. An examination of the decision and the action of the court would indicate that no consideration was given to the fact that there was possible liability on the part of others besides plaintiff's assured. On this point, this case is of little help.

In the *Adams* case, an explosion occurred in a building at the Indiana State Fairgrounds in Indianapolis and 73 people were killed and 300 or more were injured. Three insurance carriers were involved as plaintiffs and approximately 13 corporate entities and six individuals were their assureds. The Court's comments regarding the injunction commence at page 867. The form of the injunction is set out on page 868 of the report, as follows:

"* * * the court will enter an order restraining all claimants from instituting or prosecuting any proceeding in any state or United States court affecting the property involved in this interpleader action, and specifically against instituting or prosecuting any such proceeding against any of the defendants herein designated as the assured, until the further order of the court, all pursuant to Title 28 U.S.C. § 2361 and § 2283."

The court then recognized the possibility that the assureds could be held to respond to judgments in amounts exceeding the "fund" created by the insurance policies. The court then made the following statement:

"This court has no power to prevent any claimant from continuing to assert a claim against any or all of the assured, in an effort to secure a judgment which would enable him to reach the personal funds of the assured. Such is not intended by the restraining order to be issued. However, no such claim may be asserted or prosecuted other than in this action, so long as such order remains in effect."

At page 867, the court indicates that there are two primary reasons for the granting of interpleader (1) to avoid multiplicity of actions and (2) to avoid an inequitable division of a common fund when the fund is insufficient to pay all of the claims against it. The action of the court was to relieve the insurance carriers from all further responsibility upon payment of the policy limits into the court registry. The court's action also preserved to the injured parties the right

to attempt to secure judgment against the individual assureds in excess of this amount. No discussion is included regarding the reservation of jury trials for the injured parties; no discussion is included regarding the duty of insurance carriers to defend the actions for damages in excess of the policy limits.

By its decision, the court effectively protected the rights of the insurance carriers; it did not in any way avoid multiplicity of actions, but specifically reserved these actions against the individuals, but limited their maintenance to the court in question. The court placed upon the assureds the burden and expense of defending damage actions for amounts exceeding the policy limits, despite the contractual obligation of the insurance carriers.

This would reduce the insured's personal assets and thereby reduce the funds available to those injured.

It can be argued that the balancing of the equities among all of the parties involved in this cause and represented by the "injunction" and the order regarding "future proceedings" left much to be desired.

Professor Chafee, in this article in 49 Yale Law Journal 377 at page 420, discusses *Klaber* v. *Maryland Casualty Co.*, 69 F.2d 934 (C.A. 8, 1934) and *Standard Surety Co.* v. *Baker*, 105 F.2d 578 (C.A. 8, 1939).

At page 418, the article indicates that the plaintiff was, in effect, a stakeholder, having issued a sur-

ety bond in the amount of $5,000 against which claims totaling over $20,000 had been made. The proceeding was a bill in the nature of interpleader and denied responsibility for certain types of claims. The District Court granted a temporary injunction, and later dissolved it, but the injunction was restored and the cause sent back to the District Court for trial of the "second stage."

Professor Chafee then, in discussing problems as presented by this case, makes the following statement:

> "At the same time, it would be undesirable to go quite so far in an automobile accident controversy as in the *Baker* case of the bankrupt broker. There the claimants were barred from suing the insured at law, and the amount of each claim against him was fixed by a court in the bankruptcy proceedings. (The second stage of the interpleader decided whether a claim so fixed was enforceable against the fund in court, and for how much.) On the other hand, in a situation like the *Klaber* case, the victims of the automobile accident should not be enjoined from suing the insured at law before a jury. That is the proper way to determine the validity and amount of each accident claim. Although claims arising out of brokerage failures are often handled in equity or bankruptcy without juries, automobile accident claims are peculiarly appropriate for jury trial. Hence, when an automobile liability insurance company is allowed to interplead, the law actions of the victims should be allowed to proceed for the purpose of determining such issues as negli-

> gence, contributory negligence, and the extent of the damage, with the insurance company fighting its best. Judgments at law against the insured will then be entered on the verdicts. But the enforcement of those judgments against the insurance company and its property should be enjoined. The judgment creditors should be left to get payment from the fund in court, either ratably or according to some scheme of priority imposed by the court in accordance with prior local decisions. Thus the second stage will not be concerned with determining the validity and fixing the amount of the claims, but only with the distribution of the fund. In that task the insurance company should probably not participate."

Petitioners recognize the remarks set forth above, but then state that the remedy Professor Chafee suggests would not protect the insurer. Petitioners contend that Professor Chafee's solution was rejected by the courts in the *Revere* and *Adams* decisions supra, when, in fact, the *Revere* case did not discuss it and the *Adams* case did go part way.

It is difficult to understand petitioners' position that "multiple litigation" must be avoided at all costs, and yet, on pages 34 and 35 of petitioners' brief it is represented that a jury trial would be saved to the claimants. If it be correct that claimants are entitled to jury trials, and although petitioners do not so state, we assume separate jury trials on the question of damages, it would not appear that any great saving would result. If petitioners are contending that there would be one jury trial regarding liability and the in-

dividual damage claims, the injured parties would then be deprived of their jury trial. See comments on this subject, 63 Yale Law Journal, 493, commencing at page 494.

The solution arrived at by the Court in *Travelers* v. *Greyhound*, supra, if interpleader is appropriate in this cause, would best protect and preserve the rights of the various parties.

That portion of the court's decision entitled "Conclusion" is as follows:

> "The various damage suit claimants and cross-complainants are free to pursue their respective actions. However, no judgment is to be executed against Travelers as to the $325,000 policy involved in this litigation except through petition in this Court in this proceeding. That does leave open the question of how long this restriction is to apply. It is our intention to continue this stay of execution against Travelers as to this fund until the other court proceedings have been finalized. Then we would, if All Woods and/or Travelers are absolved from liability, permit Travelers to reclaim its $325,000. If, on the other hand, judgments are rendered against Travelers, either directly or through All Woods' coverage, we would proportionately divide the $325,000 among the claimants as their interest may appear. If Greyhound establishes its rights by way of contribution and/or indemnity in the retained 'fund,' then its proportionate interest could be equitably divided along with other claimants proceeding directly against the fund at the time final judgments are obtained. This relief would protect

> Travelers against any dangers incident to paying off the first final judgment, and it further avoids a race to final judgment among the various 'claimants' to the fund."

Might we outline the results of such a decision?

1. The injured parties would retain the right to a jury trial, both against the insured and the joint tort feasor, with the liabilities of each and damages, if any, determined by a jury;

2. The injured parties would retain the right to choose the forum of the actions;

3. The insurance company would be protected from the possibility of being required to pay more than its policy limits;

4. The insured would be guaranteed that the insurance company would defend the actions.

It is respectfully submitted that in the balancing of the equity as between all of the parties involved in this cause, the position of Greyhound Lines, Inc., should be ignored. A brief statement of this petitioner's standing appears on page 7, footnote 3, of petitioners' brief. As indicated, this petitioner contends the maintenance of interpleader by State Farm "would provide a convenient proceeding in which to resolve some or all of the claims against Greyhound." May we again state that convenience to a joint tort feasor should not be the basis for this Court's determination of jurisdiction of the cause or the form of the restraining order.

CONCLUSION

Respondents submit that the decision of the Ninth Circuit Court of Appeals should be affirmed on the grounds that the Court does not have jurisdiction of the subject matter, either because the injured defendants were not claimants or because of lack of jurisdiction of necessary parties. If the Court determines that jurisdiction should be retained, respondents submit that the equities in this case are such as demand a restraining order limiting the injured parties from executing against State Farm and its insured, but authorizing the maintenance to judgment of separate actions against the individual and the joint tort feasor, Greyhound.

Respectfully submitted,

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